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No. 00-1246

In The

# Supreme Court of the United States

DANIEL REED, BY AND THROUGH HIS CONSERVATOR, JOLAINE ALLEN,

*Petitioner,*

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF

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## ARGUMENT

Respondent's brief (hereinafter Res.) in opposition helps make the case for why these issues and this case are appropriate for review by this Court.

1. Respondent asserts throughout its brief that failure to warn (apparently at all levels, including at the event itself as the event became increasingly dangerous) and failure to separate cars and campers, were "safety" decisions based on "policy." Res. 9, 10, 12, 13. Nowhere, however, does Respondent identify, even hypothetically, the policy or policies that supposedly persuaded the BLM to fail to take any one of these safety measures. To be sure, consideration was given to other policies (environmental protection, free speech issues, and commercial, public use of federal land). But nowhere in the record is there evidence of a policy decision not to warn, nor a policy basis for failure temporarily to suspend the permit when the danger of the event became palpable, nor a policy basis for ignoring standard, objective event planning practice for events of this size.

Respondent's boldness in failing to cite a policy or policies illustrates again the unworkability of this Court's "susceptible to policy analysis" dictum in *United States v. Gaubert*, 499 U.S. 315, 325 (1991). Since there is no decision that is not "susceptible to policy analysis," Respondent need not bother to vouchsafe a policy basis to this Court. In the court below, *ex post* declarations with respect to the permit process make vague, non-specific references to "safety," and the U.S. attorney accepted the invitation of the "susceptible to policy analysis" language to speculate in its brief (with no evidence in the record) that mixing cars and campers in this dangerous environment may be convenient to "car camping." Appellee Br.

24. Surely Congress had something more substantial in mind when it adopted the FTCA.

2. Perhaps the most far-reaching and pernicious concept advanced by Respondent is that, despite the broad waiver of immunity in the FTCA, government agencies administering government lands may simply opt out of the FTCA by delegating their liability to others (in this case the promoter of Burning Man). Res. 10, 11, 12, n.3.

Firstly, contrary to the government's assumption, it is not a necessary or fair reading of the permit in this case to assume that the government *did* delegate its tort responsibility exclusively to Burning Man. The permit should be read as making Burning Man primarily responsible for safety and order, and imposing on Burning Man the obligation to indemnify the government should the government be held liable for the government's own negligence, as landowner, with respect to the event. Indeed, anticipating its possible liability, the government required itself to be named as an additional insured on the $100,000 insurance required of Burning Man. For future events it raised the required limit by 50 fold. Pet. 29.

Should the permit be read as delegating the government's tort liability to Burning Man, it would fly in the face of the FTCA. Quite apart from the conflict among the circuits and the importance of clarifying *Gaubert*, the importance of this issue alone justifies review. The FTCA clearly waives immunity under circumstances in which a private person in the state would be liable. If a private landowner may not delegate its duty to another (especially one with inadequate means to compensate the injured party), neither can a federal agency. Any other reading of the FTCA has never been endorsed by this

Court, nor could it be. It would allow government agencies that find the FTCA inconvenient simply to opt out by administrative fiat. See also section 6, *infra*.

The simplicity of Respondent's arguments belies its staggering scope. The FTCA makes the government liable for negligent conduct of its agents under applicable state law. Discretionary functions, however, are excepted. Respondent argues, in effect, that it is a valid exercise of discretion under the act for federal agencies or agents to transfer all of the tort obligations imposed under the FTCA to other parties *even though applicable state law would not permit the transfer*. The FTCA, therefore, does not apply.

Between coequal branches of government, this riddle or conundrum might present a challenging exercise in logic. As between Congress and subordinate federal agencies, however, Congress must prevail. Having waived sovereign immunity in the FTCA, Congress has occupied the field. Federal agencies may exercise "discretionary" judgments with respect to many other things, but in the absence of special legislation, a federal agency may not, in the guise of discretion, choose to reimpose pre-1946 sovereign immunity on its operations.

3. Respondent ignores the mandatory duty to suspend the permit imposed on the BLM and its agents by its own Manual. Respondent mentions the BLM's Manual only once. Res. 7. In *Berkovitz v. United States*, 486 U.S. 531 (1988), this Court clearly held that a mandatory duty may arise from either statute, regulation, *or policy*. *Id.* at 536. Indeed, this Court remanded *Berkovitz* based on the allegations of the existence of a "policy."

Thus, in the present case it makes no difference whether the duty to protect public safety by a temporary suspension of the permit arises from 43 C.F.R. subpt.

2920.9-3(b)(1) or from 43 C.F.R. 8372.5(a)(1) (see Res. 7 and n.2). The two regulations are united under the one mandatory obligation in the BLM's own Manual. The BLM officials responsible for enforcement and supervision of the permit and Respondent in its brief below both concede that their obligation to temporarily suspend the permit was a mandatory one. Appellee Br. 34, ER Tab 66 at 5. Their contention, that they were unaware of any permit violations by Burning Man, is a factual one to be tested at trial. It would be an extravagant construction of Congress' intent to suggest that ignorance or lack of awareness is choice, but even if ignorance implies "choice," it is hardly choice based on social, economic or political policy.

4. Respondent's attempt to distinguish *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994), grossly misstates the content of the applicable regulation, 43 C.F.R. 2920.9-3(b)(1). Respondent states:

> "The regulation *provides* that *after* determining non-compliance, BLM officials must weigh public health, safety, and environmental concerns in determining whether to suspend a permit." Res. 9. [Emphasis added]

The regulation provides no such thing. 43 C.F.R 2920.9-3(b)(1) provides that:

> "Upon determination that there is noncompliance with the terms and conditions of a land use authorization which adversely affects the public health, safety or welfare or the environment, the authorized officer *shall issue an immediate temporary suspension.*" Pet. App. 40. [Emphasis added]

Should one have any doubt whatsoever about the meaning of this duty, it is resolved by the mandatory duty temporarily to suspend the permit set forth in the BLM

Manual effectuating the regulatory duty. The Sixth Circuit's *Myers* decision is in direct conflict with the Ninth Circuit's decision in the present case.

5. Respondent's attempt to distinguish the Tenth Circuit's conflicting decision in *Duke v. Department of Agric.*, 131 F.3d 1407 (10th Cir. 1997) (failure to warn camper crushed in tent of hazard posed by falling boulders not protected by discretionary function exception) is even less convincing. Petitioner asserts that "[n]either *Duke* nor *Boyd* [failure to warn swimmers of danger from power boats] involved an application for a special use that created attendant safety concerns." Res. 12. This argument simply ignores the obvious. The hazard that injured the plaintiff in *Duke* was engendered by the government's decision to *build a dam and a state road to the dam*. These are discretionary decisions of such scope and magnitude as to beggar the special use permit granted to Burning Man. Respondent, as did the Ninth Circuit (Pet. App. 11) simply endorses the seductive trap that once discretion is found at some level then, just as electromagnetic radiation permeates our environment, discretion permeates all conduct at all levels thereafter.

It is significant that the *Duke* court makes no mention of how the obligations and liabilities between the United States and the State of New Mexico were allocated for the project or the later maintenance of the state road next to which the accident occurred. As complex as these arrangements must surely have been, they are not mentioned by the *Duke* court for the simple reason that they make no difference with respect to the landowner's duty to warn campers of the danger of being injured in their tents. Whatever the contractual relationship between the government and the state, the failure to warn was simply

not a decision based on broad social, economic, or political policy. Thus, *Duke* squarely conflicts with the Ninth Circuit's decision in the present case. One may read as much into the Ninth Circuit's failure to mention *Duke* or to attempt reconciliation of this extensively briefed case with its decision in the present case. (See App. Br. 14, 19, 20-23, 25, 30, 32, 36, Appellee's Br. 28-30, Reply Br. 5, 8, 10, 15, 16)

6. Scholars have noted that the present formulation of the discretionary function exception is incoherent and produces unpredictable and, therefore unfair results. See James Levine, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 Colum. L. Rev. 1538, 1547 n.47 (2000) (collecting scholarly comment). Perhaps there is no better illustration than a more recent decision (March 7, 2001) by a different panel of the Ninth Circuit, *Marlys Bear Medicine v. United States*, 241 F.3d 1208 (9th Cir. 2001).

The panel in Petitioner's case held that event monitoring for compliance with permit stipulations (including those addressing safety) is protected by the discretionary function exception. Pet. App. 12. On March 7, a different panel of the Ninth Circuit held that monitoring (in this case of a timber harvest on Indian Reservation land) was *not* protected by the discretionary function exception to the FTCA. *Marlys Bear Medicine v. United States, supra* (plaintiff fatally injured in course of timber harvesting pursuant to permit of BIA). Thus, the Bureau of Indian Affairs, which, pursuant to its operational manual, regularly inspected the logging site to ensure "adherence to basic policy and forestry practices," was not protected by the discretionary function exception:

> "Even if the BIA did have discretion in its monitoring of the Lone Bear reservation, its actions

> in carrying out its responsibilities are not protected policy judgments and therefore fail to satisfy the second prong of the discretionary function analysis." *Marlys Bear Medicine, supra,* 241 F.3d at 1215.

Although in Petitioner's case there is a mandatory ("shall") duty to suspend the permit for violations or "stipulations providing for the safety or health of the public" (BLM Manual, H-8372-1, VIIC – Pet. App 46-47), in *Marlys Bear Medicine* the relevant provision (this time found in the contract rather than in a manual or regulation) merely stated that "The Superintendent [of BIA] *may* . . . suspend any or all of the Purchaser's operation under the contract if the Purchaser violates any of the requirements of the contract." *Marlys Bear Medicine, supra,* 241 F.3d at 1212 n.2 [Emphasis added]. Although the use of "may" clearly implies choice, the panel held that implementation of safety precautions – in this case through monitoring and the ability to suspend the permit – is not the kind of decision grounded in social, political or economic policy.

In Petitioner's case, the panel held that determination of a safety violation would "necessarily include a discretionary balancing of policy considerations." Pet. App. 14. Moreover, since the record did not disclose that the BLM had "determined a permit violation affecting the public health or safety had occurred," the BLM's conduct was protected by the discretionary function exception. Pet. App. 13. By contrast, in *Marlys Bear Medicine,* the BIA's failure adequately to inspect and manage the logging site, and the failure to ensure that appropriate safety measures were taken, were not protected by the discretionary function exception. *Id.* at 1215. There is no suggestion in the opinion that the BIA determined, or failed

to determine, a violation. This is because, while a "determination" may at some level involve choice, it is not the kind of choice protected by the discretionary function exception.

The panel in Petitioner's case held that suspension of the permit was left to the discretion of the BLM. Pet. App. 14. The panel in *Marlys Bear Medicine* (citing *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991)) held that, merely because the contracting officer "must weigh the effects of shutting the job down versus the benefits of the safety measure," (*id.* at 1215-1216) the decision was not protected by the discretionary function exception. The panel in *Marlys Bear Medicine* arrived at this result despite the implication of choice in the use of "may . . . suspend" in the governing contract provision. *Marlys Bear Medicine, supra*, 241 F.3d at 1212 n.2.

In the present case, the BLM delegated safety measures to Burning Man. In *Marlys Bear Medicine*, the BIA delegated safety measures to the Indian tribe ostensibly for the purpose of "promoting independence in the Indian Tribes." *Id.* at 1216. Unlike the panel in Petitioner's case, the panel rejected even this policy basis as a basis for discretionary function immunity. *Ibid.*

Finally, the panel in Petitioner's case purports to find policy-based discretion in *ex post* assertions in the U.S. attorney's brief of *possible* policy bases for failure to segregate cars and campers, failure to warn participants, and failure temporarily to suspend the permit. In so doing, the government attempts to accept this Court's invitation in *Gaubert* to extend the protection of the discretionary function exception to any choice that is "susceptible to policy analysis." *United States v. Gaubert*, 499 U.S. 315, 324-25 (1991). The panel in *Marlys Bear Medicine*, however,

rejected this approach and rejected "ex post rationalizations by the Government in an attempt to invoke the discretionary function shield." *Marlys Bear Medicine, supra*, 241 F.3d at 1216. As Petitioner argued in the court below (App. Brief 37), any other approach would allow the government administratively to immunize itself from tort liability by hypothesizing possible policy bases for failure to implement on-site, garden-variety safety measures. Although rejecting this argument in Petitioner's case, in *Marlys Bear Medicine*, the panel agreed that "[t]his argument would essentially allow the Government to 'administratively immunize itself from tort liability under applicable state law as a matter of "policy." ' " Citing *McGarry v. United States*, 549 F.2d 587, 591 (9th Cir. 1977). Surely Congress, in adopting the FTCA, did not intend for agencies, especially at the implementation level, to opt out of the FTCA by a mere ex post recitation of possible "policy" bases for decisions.

The juxtaposition of the panel's decision in Petitioner's case with the more recent panel decision in *Marlys Bear Medicine* underscores the arbitrary and unpredictable results invited by this Court's "susceptible to policy analysis" dictum in *Gaubert, supra*. It is an appropriate time to clarify the standards for the discretionary function exception. Petitioner's case is an appropriate one in which to do so.

7. Respondent argues that, since this is an issue of statutory interpretation, there is no reason to clarify this Court's interpretation of the FTCA. Res. 7. This is no more than to say that if this Court got it wrong, or penned a dictum in a regulatory context which is inapposite in a proprietary context, it is up to Congress to get it right. Respondent ignores the reality of the legislative process and the history of the FTCA.

Congress has shown little interest in revisiting the FTCA. The discretionary function exception stands as it was enacted in 1946. Until 1988 the planning level/operational level rule of interpretation held currency. It is as apt to argue that, had Congress preferred the "susceptible to policy analysis, ergo policy based" formula for governmental immunity outside the regulatory sphere, Congress could have adopted it. Congress did not.

This Court cannot sidestep its duty to do its level best to effectuate the Congressional intent. Unlike federal courts in some diversity cases, it does not have the option to certify this difficult issue to Congress for an advisory opinion. Petitioner, Mr. Reed, must live with his future, whatever it holds. But for the FTCA, and the thousands of cases falling under it, the buck stops with this Court.

## CONCLUSION

It is respectfully submitted that the Petition should be granted.

Respectfully submitted,

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